FILE COPY.

FILED
APR 10 1905
JAMES H. McKENNEY,
Clerk.

# Supreme Court of the United States.

**OCTOBER TERM, 1904.**

**No. 76.**

---

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.* THE CENTRAL CROSSTOWN RAILROAD COMPANY,

*Plaintiff in Error,*

*against*

THE STATE BOARD OF TAX COMMISSIONERS,

*Defendants in Error.*

---

**In Error to the Supreme Court of the State of New York.**

---

## POINTS FOR DEFENDANTS IN ERROR.

---

JULIUS M. MAYER,
*Attorney General of the State of New York.*

LOUIS MARSHALL,
*Of Counsel.*

# SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1904.

No. 76.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* THE CENTRAL CROSSTOWN RAILROAD COMPANY,
Plaintiff in Error,

*against*

THE STATE BOARD OF TAX COMMISSIONERS,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF NEW YORK.

## Points for Defendants in Error.

This cause was instituted in the Supreme Court of the State of New York by the relator, who prayed that a writ of certiorari might be allowed directed to the defendants in error, for the purpose of reviewing an assessment to the amount of

$392,414.31, that being the valuation placed on the special franchises belonging to the relator, such assessment having been made under the provisions of Chapter 712 of the Laws of 1899, which is known as the Special Franchise Tax Law (Rec. pp. 3-8).

The questions involved in this cause are substantially identical with those which have been considered in the Points submitted herewith in the case of The People of the State of New York *ex rel.* The Brooklyn City Railroad Company *v.* The State Board of Tax Commissioners, which is No. 79 on the present docket. It is therefore deemed desirable to avoid repetition, and in consequence, the argument presented in that case will be treated as having been repeated in the present case.

The differences between these two cases, which will be briefly adverted to, are indicated by the terms of the franchises of the relator, on which the assessment which is the subject of attack in this proceeding has been based.

The issues herein were referred to Hon. Robert Earl, and were tried in conjunction with those arising in the Brooklyn City Railroad Company case. Independent findings of fact and of law were made by the referee. They appear at Record pages 354-361.

The opinions rendered in this cause by the referee, the Appellate Division of the Third Department of the Supreme Court and the Court of Appeals are identically the same as those which were delivered in the Brooklyn City Railroad Company case. They appear at Record pages 361-395; 431-454; 466-488.

The special franchises owned by the relator

were two in number and were conferred by Chapter 160 of the Laws of 1873 and Chapter 301 of the Laws of 1873, respectively. Under the first of these acts, the Central Crosstown Railroad Company was formed, and under the second the Christopher and Tenth Street Railroad Company the latter being subsequently absorbed by the former. (Rec. pp. 32-35; 335, 345, 351.)

A statement of the provisions of these two statutes will render further discussion unnecessary.

(1) Chapter 160 of the Laws of 1873.

Section 1 empowers certain persons therein named, or their assigns, "to lay, construct, operate, maintain and use railways with a double or single track in the City of New York, and to convey passengers thereon for compensation through, upon and along" certain designated streets.

Section 2 provides:

"Said railway shall be constructed on the most approved plan for the construction of city railways and with the rail now used upon the street railways in Philadelphia, commonly called the Philadelphia rail; and cars shall be run as often as the convenience of the public may require, and shall be subject to such reasonable rules and regulations in respect thereto as the common council of the City of New York from time to time may prescribe, and to the payment to the city of such license fee annually for each car run thereon as shall be prescribed by the common council thereof, but not exceeding the amount authorized by any ordinance heretofore passed; and the said persons and their assigns are hereby authorized to charge and collect five cents for each passenger conveyed upon said railways. Whenever the track

or tracks of said railway shall cross or intersect the track or tracks of any other railroad by mutual agreement between the owners of such respective railroads, transfer tickets may be issued to passengers at an additional rate of fare not exceeding two cents. Said transfer tickets to be received in full for fare to any point on the line of said railroads or either of them."

Section 3 makes provision for the contingency of the use by any other railroad company of the route designated, and secures compensation for such use to the grantees.

Section 4 relates to the organization meeting of the incorporators.

Section 5 is as follows:

"*And for the rights and privileges herein granted* the said persons or their assigns shall annually on the first day of December in each year pay into the treasury of the City of New York three per centum of the gross receipts from the operation of the railroad, the amonut of which gross receipts shall be determined by the sworn statement of the president and treasurer of said railroad company, but subject to the inspection of their books by the comptroller of the city."

Section 6 declares:

"*The legislature may at any time alter, amend, or repeal this act.*"

(2) Chapter 301 of the Laws of 1873.

Section 1 empowers the incorporators named, to lay, construct, operate and use a railroad on designated streets.

Secton 2 is as follows:

"The said railroad shall be constructed on the most approved plan for the construction of city railroads and shall be run as often as the convenience of passengers may require, and shall be subject to such reasonable rules and regulations in respect thereto as the common council of the City of New York may from time to time prescribe, and the said persons and their assigns are hereby authorized to charge the same rate of fare for the conveyance of passengers on said railroad as is not charged by other city railroads in the said city not to exceeed five cents fare for each passenger. *And for the rights and privileges herein granted* the said persons or their assigns shall annually on the first day of December in each year pay into the treasury of the City of New York three per centum from the gross receipts from the operation of the railroad. The amount of the gross receipts shall be determined by the sworn statement of the president and treasurer of said railroad, but subject to the inspection of their books by the comptroller of the city; keep in good repair the pavement, the width of their tracks, and eighteen inches upon the outside of the same, through the streets and avenues and places on the above mentioned route."

Section 3 permits the grantees to run upon and use other railways, and provides for the ascertainment of the compensation to be made.

Section 4 reads:

*"The legislature may at any time, alter, amend or repeal this act."*

Both of these charters expressly declare that the percentage of gross receipts which is required to be paid into the treasury of the City of New York, is "for the rights and privileges granted"

by these several acts. It is by way of compensation and consideration for the grant. It is not a tax, or paid by way of commutation of future taxation. The terms employed are not those of taxation. The language is that of bargain and sale. A valuable property right is conferred, and a partial *quid pro quo* is required to be given in return for that which is granted.

Both of these statutes expressly reserved to the legislature, the power to alter, amend or repeal their several provisions. Hence, the doctrines to which we have adverted under Point II, subdivision (*i*), pages 65 to 76 of the main brief, No. 79, would support the legislation which is now undergoing examination, even if it were permissible to supplement these statutes, by some extraordinary and hitherto unsuspected process of interpretation, which would read into them, clauses operating as an exemption from taxation.

It is respectfully submitted that the judgment appealed from should be affirmed.

JULIUS M. MAYER,
Attorney General of the
State of New York.

LOUIS MARSHALL,
WM. A. KEENER,
Of Counsel.